Perbadanan Nasional Insurans Sdn Bhd v Pua Lai Ong

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO B-02-370-95

SITI NORMA YAAKOB, ABDUL MALEK AHMAD AND MOKHTAR SIDIN JJCA

11 JULY 1996

Civil Procedure *— Affidavits — Affidavit in reply — Time limit for filing and service — Affidavit in reply must be filed and served on the other party within 14 days from date on which affidavit he intends to reply was served on him — Opposing party served summons with affidavit — Whether time started to run upon service of unsealed or sealed copy of summons — Rules of the High Court 1980 O 32 r 13(2)(b)*

Civil Procedure *— Summary Judgment — Affidavit — Affidavit in reply — Time for filing and service — Applicability of O 32 r 13(2)(b) — Whether court has discretion to allow the use of affidavit which did not comply with O 32 r 13(2)(b) — Rules of the High Court 1980 O 32 r 13(2)(b)*

In the High Court, the plaintiff sued the defendant, which was an insurance company, to enforce a judgment that he had obtained. The defendant entered conditional appearance. On 28 February 1995, the defendant made an application by way of summons in chambers, supported by an affidavit to set aside the plaintiff's writ and statement of claim on the ground that the plaintiff had sued the wrong party. The defendant's solicitor served an unsealed copy of the application together with the affidavit on the plaintiff, and these were received by the plaintiff on 3 March 1995. The sealed copy of the application and its supporting affidavit were served on the plaintiff on 12 April 1995. The plaintiff in turn filed and served his affidavit in reply on the defendant on 14 April 1995. At the hearing of the application, the defendant raised a preliminary objection that the plaintiff's affidavit in reply could not be used, as it was in breach of O 32 r 13 (2)(b) of the Rules of the High Court 1980 ('the RHC') which provides that an affidavit in reply must be filed and served on the other party within 14 days from the date on which the affidavit he intends to reply was served on him. The trial judge disallowed the objection and hence the appeal. The issue before the court was whether time started to run from 3 March 1995, the date when the plaintiff received the affidavit with the *unsealed* copy of the application, or 12 April 1995, the date when the plaintiff received the affidavit with the *sealed* copy of the application.

Held, dismissing the appeal:

(1) The 14-day period under O 32 r 13(2)(b) of the RHC started to run from the time the same affidavit was served on the plaintiff the second time together with the sealed copy of the summons on 12 April 1995, as the affidavit in support could not exist on its

own independently of the summons, and until the summons that it support was sealed, the affidavit had no legal effect and neither did it create any obligation on the part of the party served with such an affidavit to reply to it (see p 90B, H–I). A

(2) The purpose of serving the unsealed copy of the summons and the affidavit in support can be nothing more than to give due notice to the plaintiff of the nature of the application and the grounds supporting the application (see p 90G). B

(3) Since official recognition of the summons had been given with the sealing of the summons and the signing of the summons by the registrar with the return date stated in the summons, the plaintiff was legally bound to reply to the affidavit in support should he wish to object to the application being granted. This he did by filing and serving the affidavit in reply on 14 April 1995, well within the 14 days from 12 April 1995 (see p 91B). C

(4) The provisions of O 32 r 13(2)(b) are applicable in proceedings for summary judgment under O 14 and the defendant has 14 days from the time he received the affidavit in support within which to reply (see p 93C). D

(5) The court has no discretion to allow an affidavit to be used in proceedings under O 14 despite the fact such affidavit had not complied with the provisions of O 32 r 13(2)(b). The defendant may however apply for an abridgement of the period required to file the affidavit in reply pursuant to O 3 r 5(1) (see p 93D–G). E

[Bahasa Malaysia summary F

Di Mahkamah Tinggi, plaintif menyaman defendan, yang merupakan sebuah syarikat insuran, untuk menguatkuasakan satu penghakiman yang telah diperolehinya. Defendan memasukkan kehadiran bersyarat. Pada 28 Februari 1995, defendan membuat satu permohonan dengan cara saman dalam kamar, yang disokong dengan afidavit untuk mengetepikan writ dan penyataan tuntutan plaintif atas alasan bahawa plaintif telah menyaman pihak yang salah. Peguam kepada defendan telah menyampaikan sesalinan permohonan yang tidak dimeterai bersama dengan afidavit sokongan kepada plaintif, dan telah diterima oleh plaintif pada 3 Mac 1995. Salinan permohonan yang dimeterai bersama dengan afidavit sokongan telah disampaikan kepada plaintif pada 12 April 1995. Plaintif memfail dan menyampaikan afidavit jawapan kepada defendan pada 14 April 1995. Pada masa perbicaraan permohonan itu, defendan membangkitkan bantahan permulaan bahawa afidavit jawapan plaintif itu tidak boleh digunakan, kerana ia melanggar A 32 k 13 (2)(b) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') yang memperuntukkan bahawa afidavit jawapan hendaklah difail dan disampaikan kepada pihak yang lain dalam masa 14 hari dari tarikh afidavit yang hendak diberi jawapan disampaikan kepadanya. Hakim perbicaraan menolak bantahan itu G H I

A dan oleh itu defendan membuat rayuan. Isu di hadapan mahkamah ialah sama ada masa bermula dari 3 Mac 1995, tarikh apabila plaintif menerima afidavit bersama dengan salinan permohonan yang *tidak dimeterai,* atau 12 April 1995, tarikh apabila plaintif menerima afidavit bersama dengan salinan permohonan yang *telah dimeterai.*

B

Diputuskan, menolak rayuan itu:

(1) Jangkamasa 14 hari di bawah A 32 k 13 (2)(b) KMT bermula daripada masa afidavit yang sama disampaikan kepada plaintif pada kali yang kedua bersama dengan salinan saman yang dimeterai pada 12 April 1995 kerana afidavit sokongan tidak C boleh wujud dengan sendirinya dengan tidak bergantung kepada saman dan sehingga saman yang disokongnya dimeterai, afidavit itu tidak mempunyai kesan undang-undang dan ia tidak mewujudkan apa-apa tanggung jawab ke atas pihak yang disampaikan dengan afidavit yang sedemikian untuk menjawabnya D (lihat ms 90B, H–I).

(2) Tujuan penyampaian salinan saman yang tidak dimeterai dan afidavit sokongan hanyalah untuk memberi notis kepada plaintif tentang jenis permohonan itu dan alasan-alasan yang menyokong permohonan itu (lihat ms 90G).

E (3) Oleh kerana pengiktirafan rasmi saman itu telah diberikan dengan pemeteraian saman itu dan ditandatangani oleh pendaftar dengan tarikh kembali dinyatakan di dalam saman itu, plaintif adalah dikehendaki di bawah undang-undang untuk membuat jawapan kepada afidavit sokongan itu sekiranya beliau berhasrat untuk F membuat bantahan terhadap permohonan yang diberikan. Ini telah dilakukan dengan memfail dan menyampaikan afidavit jawapan pada 14 April 1995 dalam jangkamasa 14 hari dari 12 April 1995 (lihat ms 91B).

(4) Peruntukan-peruntukan A 32 k 13(2)(b) adalah terpakai dalam prosiding untuk penghakiman terus di bawah A 14 dan defendan G mempunyai 14 hari daripada tarikh beliau menerima afidavit sokongan itu untuk membuat jawapan (lihat ms 93C).

(5) Mahkamah tidak mempunyai budi bicara untuk membenarkan afidavit jawapan digunakan dalam prosiding di bawah A 14 jika afidavit tersebut tidak mematuhi peruntukan-peruntukan A 32 k H 13(2)(b). Walau Bagaimanapun, defendan boleh memohon untuk memendekkan jangkamasa untuk memfailkan afidavit jawapan mengikut A 3 k 5(1) (lihat ms 93D–G).]

Notes

I For cases on affidavits, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 176–204.

For cases on summary judgment, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 3197–3520.

Cases referred to

Malayan Banking Bhd v Lim Tee Yong & Ors [1994] 3 MLJ 715
Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd & Ors [1994] 1 MLJ 704
PB Securities Sdn Bhd v Abdul Rashid bin Mohamed [1994] 3 MLJ 168
Wing Tiek Holdings Bhd v Yong Chee Thiam & Anor [1994] 3 MLJ 379

Legislation referred to

Rules of the High Court 1980 O 14 rr 2, 4(1) & (2), O 32 rr 2 & 13

Appeal from: Civil Suit No 22–511–94 (High Court, Shah Alam)

Tunku Farik Tunku Ismail (*Azim Ong & Krishnan*) for the defendan/appellant
K Santhrasergaran (*Rastam, Singa & Co*) for the respondent/plaintiff

Cur Adv Vult

Siti Norma Yaakob JCA (delivering the judgment of the court): We had dismissed this appeal, made no order as to costs and directed that the deposit be refunded to the appellant. We now give our reasons for having decided so.

In the court below, the respondent/plaintiff had sued the appellant/defendant to enforce a judgment obtained by the respondent in proceedings for damages for personal injuries brought by him against one Kassim bin Yunus, the driver of the motor vehicle that was involved in a collision with the respondent. At the material time, the said Kassim bin Yunus had insured the motor vehicle with an insurance company known as L'Union Des Assurances De Paris, IARD, a French based company whose business in Malaysia is conducted by the appellant.

The appellant entered a conditional appearance to the respondent's writ and statement of claim, and this was followed by the appellant filing an application under O 2 r 2 of the Rules of the High Court 1980 ('the RHC'), to set aside the writ and statement of claim, on the grounds that the respondent had sued the wrong party, as the policy was issued by the French company and not by the appellant.

At the hearing of the application, the appellant raised a preliminary objection that the respondent's affidavit on 13 April 1995 cannot be relied upon by the respondent at the hearing, as the affidavit in reply did not comply with the provisions of O 32 r 13(2)(b) of the RHC.

The learned trial judge disallowed the objection and hence the present proceedings before us.

A Order 32 of the RHC deals generally with applicants and proceedings in chambers, and for the purposes of this appeal, rr 2 and 13 have been put in issue. For ease of reference we reproduce these two rules:

> Issue of summons.
>
> 2 (1) Issue of a summons by which an application in Chambers is to be
> B made takes place on its being sealed by an officer of the Registry.
>
> (2) A summons may not be amended after issue without the leave of the Court.
>
> Notice of filing, etc of affidavit.
>
> 13 (1) Any party—
> C
> (a) filing an affidavit intended to be used by him in any proceedings in Chambers; or
>
> (b) intending to use in any such proceedings any affidavit filed by him in previous proceedings,
>
> must give notice to every other party of the filing or, as the case may be, of
> D his intention to do so.
>
> (2) Save as otherwise provided in these rules—
>
> (a) an affidavit intended to be used in support of an application must be filed and served on the other party within 14 days from the date of the filing of the application; and
>
> (b) a party wishing to reply an affidavit and serve on him must file
> E his affidavit and serve it on the other party within 14 days from the date on which the affidavit he intends to reply was served on him.

We would like to add that O 32 r 13(2) was added by way of an amendment to the RHC for the orderly disposal of applications in chambers and it
F came into effect on 1 August 1993. It sets out the time frame within which affidavits, intended to be used in proceedings in chambers, either in support of or in reply to such applications, are to be filed and served, thereby preventing any last minute filing and service of such affidavits which, before the amendment, would have necessitated such applications
G being adjourned repeatedly, thereby causing delay.

In this instant appeal, the appellant had on 28 February 1995 filed the summons in chambers together with its supporting affidavit affirmed on 27 February 1995. At the same time, the appellant's solicitors served an unsealed copy of the application together with the supporting affidavit on the respondent and this was received by the respondent on 3 March 1995.
H

Subsequently, the appellant served the sealed copy of the application issued under O 32 r 2(1) of the RHC together with the supporting affidavit on the respondent on 12 April 1995. This was followed on 14 April 1995 with the respondent filing his offending affidavit in reply which he had affirmed a day earlier and serving a copy of it on the appellant the same
I day it was filed.

The appellant now contended that the affidavit in reply cannot be used by the respondent at the hearing of the application as it was filed and served outside the time stipulated by O 32 r 13(2)(b). The appellant

argued that since the respondent had received the affidavit in support on 3 March 1995, he had 14 days from that date within which to file and serve his affidavit in reply. Thus he had until 17 March 1995 to do so, but the fact that he waited until 14 April 1995 to file and serve his affidavit in reply was clearly a breach of the provisions of O 32 r 13(2)(b). A

Every application in chambers must normally begin by way of summons supported by an affidavit affirmed by the party making the application. Both the summons and affidavit must be filed and served on the other party as required by O 32 r(1) and (2) read together with r 13(1)(a) of the same order. The right to reply by affidavit is then opened to the other party but this right must be exercised within the 14-day period stipulated by sub-rule (2)(b) of O 32 r 13. The issue raised before us is, when does time start to run? On the facts of this case, is it from the first time the respondent received the appellant's affidavit in support together with the unsealed copy of the summons on 3 March 1995, as the appellant contended, or from the time the same affidavit was served on the respondent the second time together with the sealed copy of the summons on 12 April 1995, as contended by the respondent? B C D

We answer this by considering firstly, the purpose why both affidavits were filed and served in the first place. In the case of the affidavit in support, it is to lay down the foundation of the application by way of the statements of facts and law disclosed in the affidavit. On the other hand, as its name suggests, the affidavit in reply is either to affirm or rebut such statements of facts or law and more often than not, to object generally to the application being granted. With such specific purpose, it is only right and proper that the parties exchange affidavits with each other so that none is taken by surprise at the hearing of the application. The procedure for such an exchange is what is being questioned before us now. E F

It is true that on 3 March 1995, the respondent became aware of the appellant's impending application to have his writ and statement of claim set aside, although he must have anticipated this when the appellant entered a conditional appearance to the writ. As at 3 March 1995, no date of hearing of the application was stated in the summons as only the unsealed copy was served on the respondent. We now ask ourselves what is the status of the affidavit in support served together with the unsealed summons? Does it require an immediate reply by the respondent within the 14 days as required by the rules? G

We reply in the negative, as the purpose of serving the unsealed copy of the summons and the affidavit in support can be nothing more than to give due notice to the respondent of the nature of the application and the grounds supporting the application. It cannot do anything more than this as the unsealed copy of the summons has yet to get the official stamp of the court to clothe it with the authority that it has been issued pursuant to O 32 r 2(1) of the RHC. The affidavit in support cannot exist on its own independently of the summons and until the summons that it supports is sealed, the affidavit has no legal effect and neither does it create any obligation on the part of the party served with such an affidavit to reply to it. For this very reason, we consider that the obligation to reply has not H I

A arisen when the unsealed copy of the summons together with the affidavit in support was served for the first time on the respondent on 3 March 1995.

However, we view the situation differently when the sealed copy of the summons together with the affidavit in support were served on the B respondent on 12 April 1995. Since official recognition of the summons has been given with the sealing of the summons and the signing of the summons by the registrar with the return date clearly stated in the summons, the respondent is legally bound to reply to the affidavit in support should he wish to object to the application being granted. This he did and by virtue of the provisions of O 32 r 13(2)(b), he had 14 days from 12 April C 1995 to file and served a copy of it on the appellant. He did so on 14 April 1995 well within the time limit and to that end we confirm the decision of the court below, that the respondent can make use of his affidavit in reply at the hearing of the appellant's application to have the writ and statement of claim set aside, to be correct. However, we declined making any order D as to costs as the merits of the application have yet to be argued and determined.

In the course of arguing this appeal, Tunku Farik bin Tunku Ismail, learned counsel for the appellant, directed our attention to four cases that dealt with the applicability of O 32 r 13(2) in applications for summary E judgment under O 14 of the RHC. He invited us to lay some guidelines to sort out the practical difficulties experienced when the decisions in those cases are put into effect.

In the case of *Malayan Banking Bhd v Siong Electronic Industries (1981) Sdn Bhd & Ors* [1994] 1 MLJ 704, Zakaria Yatim J (as he then F was), had to consider whether that particular order and rule had a retrospective effect when dealing with an O 14 application before him. The learned judge had also to determine whether two affidavits, one affirmed by the plaintiff, and the other by the defendant, both filed after O 32 r 13(2) came into effect, can be used at the hearing of the application. The learned judge held that O 32 r 13(2) applies retrospectively, and for G that very reason, the two affidavits could not be used in the proceedings before him. Whilst the decision in that case is not that glaringly relevant to the issue raised before us, the decisions of the other cases, however, are more in point.

In *PB Securities Sdn Bhd v Abdul Rashid bin Mohamed* [1994] 3 MLJ H 168, Richard Tallala J, whilst accepting there is nothing incompatible between the provisions of O 14, and the provisions of O 32 r 13(2), and that they can operate harmoniously with each other, nonetheless, held that the provisions of O 32 r 13(2) do not apply to proceedings brought under O 14, or to affidavits filed or intended to be filed thereunder. On that finding, the learned judge held that the defendant's affidavit in reply in the I O 14 proceedings before him, although filed and served on the plaintiff four days after the time limited for filing and service under O 32 r 13(2)(b) was correctly filed and served as of right.

This view was not shared by both Shaik Daud J (as he then was), in the case of *Wing Tiek Holdings Bhd v Yong Chee Thiam & Anor* [1994] 3 MLJ 379, and Mohd Hishamudin Mohd Yunus JC (as he then was), in the case of *Malayan Banking Bhd v Lim Tee Yong & Ors* [1994] 3 MLJ 715.

In *Wing Tiek Holdings*, the learned judge held that although O 14 r 2 (3) prescribes the time when an affidavit in support of an O 14 application has to be served on the defendant, it is completely silent as to when an affidavit in reply has to be served by the defendant. In the absence of such a provision, the learned judge held that service of the affidavit in reply ought to follow the general procedure laid down in O 32 r 13(2)(b) and to that end, it is incorrect to say that r 13(2) has no application to O 14 proceedings.

Mohd Hishamudin Mohd Yunus JC (as he then was), in *Malayan Banking Bhd v Lim Tee Yong & Ors* (supra), went one step further by stating that despite there being non-compliance with O 32 r 13(2)(b), the court has a discretion to allow an affidavit in reply to be used in an O 14 application. However, in the case before him, the learned judicial commissioner declined to exercise his discretion as he found that there had been substantial delay in the filing and the service of the affidavit in reply.

Order 32 r 13(2) begins with these qualifying words, 'Save as otherwise provided in these rules', and we consider that the effect of those words is that, when the RHC make specific provisions as to the filing and the service of affidavits for use in proceedings in chambers, those specific provisions must be adhered to. It is only when the RHC are silent as to the procedure of how such affidavits is to be filed or served that the general provisions of O 32 r 13(2) become applicable.

In proceedings for summary judgment under O 14 r 2 thereof prescribes the manner in which the application for summary judgment is to be made with the following provisions:

> 2 (1) An application under rule 1 must be made by summons supported by an affidavit in Form 18 verifying the facts on which the claim, or the part of a claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, or no defence except as to the amount of any damages claimed.
>
> (2) Unless the Court otherwise directs, an affidavit for the purposes of this rule may contain statements of information or belief with the sources and grounds thereof.
>
> (3) The summons, a copy of the affidavit in support and of any exhibits referred to therein must be served on the defendant not less than 4 clear days before the return day.

A defendant intending to object to such an application may do so pursuant to the provisions of r 4(1) and (2) which state as follows:-

> 4 (1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court.

A (2) Rule 2(2) applies for the purposes of this rule as it applies for the purposes of that rule.

A closer reading of r 2(3) and r 4(1) reveals that in the case of the affidavit in support, there is a time frame mentioned when such an affidavit is to be served on the defendant. Rule 2(3) specifies it to be four clear days before B the return date. We do not find any corresponding time frame mentioned in r 4 or any other rule when the affidavit in reply should be filed and served other than stating that a defendant may show cause against the application by way of an affidavit in reply at sub-rule (1). The rule is silent as to when such an affidavit in reply is to be filed and served on the plaintiff. It is to fill this lacuna in the procedure that O 32 r 13(2)(b) can C be relied upon to fill in the gap. The defendant has 14 days from the time he received the affidavit in support within which to reply. To that end, we consider that the provisions of r 13(2)(b) are applicable in proceedings for summary judgment under O 14 and we confirm the finding reached in the *Wing Tiek Holdings Bhd* case to have correctly stated the law on the D procedure to be followed in O 14 proceedings vis-à-vis the applicability of O 32 r 13(2)(b) to such proceedings.

Having stated that, we now ask ourselves whether the court has the discretion to allow an affidavit in reply to be used in proceedings under O 14 despite the fact that such affidavit had not complied with the provisions E of O 32 r 13(2)(b).

We answer in the negative for the following reasons.

Order 32 r 13(2)(b) makes it mandatory for such an affidavit in reply to be filed and served within 14 days from the time the affidavit that it seeks to reply is received. The word 'must' as opposed to 'may' is used in F the rule, and we interpret that to mean as implying a peremptory mandate as opposed to a mere direction or discretion as the word 'may' implies. We equate the meaning of the word 'must' as that given to the word 'shall', and for that reason the choice of the word 'must' in the rule does not create the existence of any discretion or empowers the court to exercise such a discretion. To state otherwise would defeat the very purpose O 32 G r 13(2) was intended ie to prevent any last minute affidavit being filed so as to protract the hearing of any proceedings in chambers. For that reason, we cannot support the finding reached by *Malayan Banking Bhd v Lim Tee Yong & Ors*, on the existence of a discretion. We hasten to add that under such circumstances, the defendant may apply for an abridgement of the H period required to file the affidavit in reply pursuant to O 3 r 5(1) of the RHC.

Order accordingly.

Reported by Ringo KL Low

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